

Federal Trade Commission

§ 801.4

identities shall be both acquiring and acquired persons.

Examples: 1. Corporation A (the ultimate parent entity included within person "A") proposes to acquire Y, a wholly-owned subsidiary of B (the ultimate parent entity included within person "B"). The transaction is to be carried out by merging Y into X, a wholly-owned subsidiary of A, with X surviving, and by distributing the assets of X to B, the only shareholder of Y. The assets of X consist solely of cash and the voting securities of C, an entity unrelated to "A" or "B". Since X is designated the surviving corporation in the plan or agreement of merger or consolidation and since X will be included in "A" after consummation of the transaction, "A" will be deemed to have made an acquisition of voting securities. In this acquisition, "A" is an acquiring person because it will hold assets or voting securities it did not hold prior to the transaction, and "B" is an acquired person because the assets or the voting securities of an entity previously included within it will be held by A as a result of the acquisition. B will hold the cash and voting securities of C as a result of the transaction, but since § 801.21 applies, this acquisition is not reportable. "A" is therefore an acquiring person only, and "B" is an acquired person only. "B" may, however, have a separate reporting obligation as an acquiring person in a separate transaction involving the voting securities of C.

2. In the above example, suppose the consideration for Y consists of \$8 million worth of the voting securities of A. With regard to the transfer of this consideration, "B" is an acquiring person because it will hold voting securities it did not previously hold, and "A" is an acquired person because its voting securities will be held by B. Since these voting securities are worth less than \$50 million, however, the acquisition of these securities is not reportable. "A" will therefore report as an acquiring person only and "B" as an acquired person only.

3. In the above example, suppose that, as consideration for Y, A transfers to B a manufacturing plant valued at \$51 million. "B" is thus an acquiring person and "A" an acquired person in a reportable acquisition of assets. "A" and "B" will each report as both an acquiring and an acquired person in this transaction because each occupies each role in a reportable acquisition.

4. In the above example, suppose that, as consideration for Y, A transfers to B a manufacturing plant valued at \$16 million. "B" is thus an acquiring person and "A" an acquired person in a reportable acquisition of assets. "A" and "B" will each report as both an acquiring and an acquired person in this transaction because each occupies each role in a reportable acquisition.

5. Corporations A (the ultimate parent entity in person "A") and B (the ultimate parent entity in person "B") propose to consolidate into C, a newly formed corporation. All shareholders of A and B will receive shares of C, and both A and B will lose their separate pre-acquisition identities. "A" and "B" are both acquiring and acquired persons because they are parties to a transaction in which all parties lose their separate pre-acquisition identities.

(e) Whenever voting securities or assets are to be acquired from an acquiring person in connection with an acquisition, the acquisition of voting securities or assets shall be separately subject to the act.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34431, July 29, 1983; 66 FR 8688, Feb. 1, 2001]

§ 801.3 Activities in or affecting commerce.

Section 7A(a)(1) is satisfied if any entity included within the acquiring person, or any entity included within the acquired person, is engaged in commerce or in any activity affecting commerce.

Examples: 1. A foreign subsidiary of a U.S. corporation seeks to acquire a foreign business. The acquiring person includes the U.S. parent corporation. If the U.S. corporation, or the foreign subsidiary, or any entity controlled by either one of them, is engaged in commerce or in any activity affecting commerce, section 7A(a)(1) is satisfied. Note, however, that §§ 802.50-802.52 may exempt certain acquisitions of foreign businesses or assets.

2. Even if none of the entities within the acquiring person is engaged in commerce or in any activity affecting commerce, the acquisition nevertheless satisfies section 7A(a)(1) if any entity included within the acquired person is so engaged.

[43 FR 33537, July 31, 1978; 43 FR 36054, Aug. 15, 1978]

§ 801.4 Secondary acquisitions.

(a) Whenever as a result of an acquisition (the "primary acquisition") an acquiring person will obtain control of an issuer which holds voting securities of another issuer which it does not control, then the acquisition of the other issuer's voting securities is a secondary acquisition and is separately subject to the act and these rules.

(b) *Exemptions.* (1) No secondary acquisition shall be exempt from the requirements of the act solely because the related primary acquisition is exempt from the requirements of the act.

(2) A secondary acquisition may itself be exempt from the requirements of the act under section 7A(c) or these rules.

Examples: 1. Assume that acquiring person “A” proposes to acquire all the voting securities of corporation B. This section provides that the acquisition of voting securities of issuers held but not controlled by B or by any entity which B controls are secondary acquisitions by “A.” Thus, if B holds more than \$50 million of the voting securities of corporation X (but does not control X), and “A” and “X” satisfy Sections 7A (a)(1) and (a)(2), “A” must file notification separately with respect to its secondary acquisition of voting securities of X. “X” must file notification within fifteen days (or in the case of a cash tender offer, 10 days) after “A” files, pursuant to § 801.30.

2. If in the previous example “A” acquires only 50 percent of the voting securities of B, the result would remain the same. Since “A” would be acquiring control of B, all of B’s holdings in X would be attributable to “A.”

3. In the previous examples, if “A’s” acquisition of the voting securities of B is exempt, “A” may still be required to file notification with respect to its secondary acquisition of the voting securities of X, unless that acquisition is itself exempt.

4. In the previous examples, assume A’s acquisition of B is accomplished by merging B into A’s subsidiary, S, and S is designated the surviving corporation. B’s voting securities are cancelled, and B’s shareholders are to receive cash in return. Since S is designated the surviving corporation and A will control S and also hold assets or voting securities it did not hold previously, “A” is an acquiring person in an acquisition of voting securities by virtue of §§ 801.2 (d)(1)(ii) and (d)(2)(i). A will be deemed to have acquired control of B, and A’s resulting acquisition of the voting securities of X is a secondary acquisition. Since cash, the only consideration paid for the voting securities of B, is not considered an asset of the person from which it is acquired, by virtue of § 801.2(d)(2) “A” is an acquiring person only. The acquisition of the minority holding of B in X is therefore a secondary acquisition by “A,” but since “B” is an acquired person only, “B” is not deemed to make any secondary acquisition in this transaction.

5. In example 4 above, suppose the consideration paid by “A” for the acquisition of B is \$60 million worth of the voting securities of “A.” By virtue of § 801.2(d)(2), “A” is both an acquiring and acquired person; B is an ac-

quired person and B’s shareholders are acquiring persons. A will still be deemed to have acquired control of B, and therefore the resulting acquisition of the voting securities of X is a secondary acquisition. Although B’s shareholders are now also acquiring persons, unless one of them gains control of “A” in the transaction, no B shareholder makes a secondary acquisition of stock held by “A.” If the consideration paid by “A” is the voting securities of one of “A’s” subsidiaries and a shareholder of B thereby gains control of that subsidiary, the shareholder will make secondary acquisitions of any minority holdings of that subsidiary.

6. Assume that A and B propose through consolidation to create a new corporation, C, and that both A and B will lose their corporate identities as a result. Since no participating corporation in existence prior to consummation is the designated surviving corporation, “A” and “B” are each both acquiring and acquired persons by virtue of § 801.2(d)(2)(iii). The acquisition of the minority holdings of entities within each are therefore potential secondary acquisitions by the other.

(c) Where the primary acquisition is—

(1) A cash tender offer, the waiting period procedures established for cash tender offers pursuant to sections 7A(a) and 7A(e) of the act shall be applicable to both the primary acquisition and the secondary acquisition;

(2) A non-cash tender offer, the waiting period procedures established for tender offers pursuant to section 7A(e)(2) of the act shall be applicable to both the primary acquisition and the secondary acquisition.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34432, July 29, 1983; 52 FR 7080, Mar. 6, 1987; 66 FR 8688, Feb. 1, 2001; 67 FR 11902, Mar. 18, 2002]

§ 801.10 Value of voting securities and assets to be acquired.

Except as provided in § 801.13, the value of voting securities and assets to be acquired shall be determined as follows:

(a) *Voting securities.* (1) If the security is traded on a national securities exchange or is authorized to be quoted in an interdealer quotation system of a national securities association registered with the U.S. Securities and Exchange Commission—